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No. 03-1109

Supreme Court, U.S.
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In The
Supreme Court of the United States

MARVIN V. FRANDSEN, JAN L. FRANDSEN, BRYAN MORRIS, FRANK J. CERVASIO, MARIANNE CERVASIO, DIAN HARDISON, and TONIANNE WYNER,

Petitioners,

v.

BREVARD COUNTY, FLORIDA and BREVARD COUNTY SHERIFF PHIL WILLIAMS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF NECESSARY FACTS

Pursuant to Rule 15(2) of the Supreme Court Rules, Respondent, Brevard County, Florida (the "County") addresses the following perceived misstatements and omissions made by Petitioners.

Petitioners are naturists who seek to promote the benefits of non-sexual nudity as part of recreation including nude sunbathing on Playalinda Beach. R.1. The Brevard County Board of County Commissioners enacted Brevard County Ordinance 95-21 ("the Ordinance") due to an increased number of complaints regarding people "engaged in open displays of sexual activity as well as lewd and lascivious conduct on all portions of Playalinda Beach." Petitioners' Appendix at p. 50a. In enacting the Ordinance, the County relied on reported instances of public masturbation, sodomy, stalking, distribution of pornographic material, sexual intercourse, lewd and lascivious acts in front of children, oral sex, propositioning sexual acts from females, public urination and defecation, and harassment by others by nude beachgoers on Playalinda Beach (R.57-Exhibit B).

The Ordinance prohibits the conduct of being nude in a public place. Petitioners' Appendix at p. 48a-59a. However, the Ordinance provides various exceptions including exemptions for constitutionally protected speech. Petitioners' Appendix at p. 57a.

Petitioners' attempt to side-step enforcement of the Ordinance and the fact that there is no constitutional right to sunbathe or associate in the nude, by claiming that they have a constitutional right to violate a law in order to protest it. Various Petitioners have been cited or arrested for violating the Ordinance. In every instance,

however, the Petitioner was completely nude at the time of the arrest or citation. Petition at pp. 2-3.

INTRODUCTION

Petitioners have failed to identify any decision of this Court or of another United States Court of Appeals in conflict with the instant case. Petitioners have merely reargued the merits of their claims and have not set forth an adequate basis for exercise of this Court's jurisdiction. Further, a review of the cases cited by Petitioners demonstrates the Eleventh Circuit properly affirmed the summary judgment in favor of the County, in accordance with this Court's established precedent.

Because arguments four and five are not directed at this Respondent, no response has been provided.

ARGUMENT

I. THE ELEVENTH CIRCUIT'S DECISION IS SUPPORTED BY, RATHER THAN IN CONFLICT WITH, THIS COURT'S DECISIONS AND NO DEPARTURE FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS CAN BE SHOWN.

The cases cited by Petitioners demonstrate that the Eleventh Circuit Court of Appeals' (hereafter "Eleventh Circuit") decision is actually supported by, rather than in conflict with, the rulings of this Court. Petitioners first cite to *Virginia v. Hicks*, 123 S. Ct. 2191 (2003), claiming that this opinion required the Eleventh Circuit to invalidate all enforcement of the Ordinance due to the Ordinance's

overbreadth. Petition at p. 9. However, as noted by this Court in *Virginia*, "[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)." *Virginia*, 123 S. Ct. at 2199 (parenthesis in original). Further, "[t]he overbreadth claimant bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists." *Virginia*, 123 S. Ct. at 2198.

In this case, the Ordinance is intended "to prohibit the conduct of being nude in public places," and is not specifically addressed to speech or to conduct necessarily associated with speech. Petitioners' Appendix at p. 48a. Petitioners have pointed to a limited amount of purportedly protected expression that they claim is affected by the Ordinance, but have not demonstrated that the law punishes a substantial amount of protected free speech as judged in relation to the Ordinance's plainly legitimate sweep – which consists of prohibiting the conduct of appearing in public in the nude. Appendix at p. 48a. Thus, pursuant to the dictates of *Virginia,* the Eleventh Circuit could not properly invalidate enforcement of the Ordinance. *Virginia*, 123 S. Ct. at 2199. Therefore, the Eleventh Circuit's decision is in accord with *Virginia* and no conflict has been shown.

Nor does conflict exist with *Hill v. Colorado*, 530 U.S. 703 (2000) or *Kolender v. Lawson*, 461 U.S. 352 (1983). Petitioners correctly point to these cases in support of the contention that a statute can be impermissibly vague if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits, or if it authorizes or encourages arbitrary and discriminatory

enforcement. Petition at p. 9. However, as noted by this Court in *Hill*:

> [T]here is little doubt that imagination can conjure up hypothetical cases in which the meaning of these terms will be in nice question, because we are condemned to the use of words, we can never expect mathematical certainty from our language. [S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications.

Hill, 530 U.S. at 733. Significantly, the words now pointed to by Petitioners as vague, including "discernibly turgid" "pubic area", and "opaque" do not come into play in this case as Petitioners were completely nude on Playalinda Beach when cited for violating Ordinance 95-21. Petitioners' Appendix at p. 21. Because "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute," the Eleventh Circuit's finding that the subject Ordinance is not vague is supported by *Hill* and *Kolender* and no conflict exists.

Likewise, no conflict exists with *Gentile v. State Bar of Nevada*, 501 U.S. 1030, (1991). Petitioners note that in *Gentile* this Court recognized that a citizen who was found in violation of a rule after studying it and making a conscious effort at compliance "demonstrates that [the rule] creates a trap for the wary as well as the unwary." Petition at p. 10. However, in that case, the rule in question was directed at punishing "pure speech in the political forum," and prevented attorneys from making extra judicial statements regarding particular cases. *Id.* at 1034. Because *Gentile* involved a materially different rule and

applied that rule to materially different facts, the case is both legally and factually distinguishable and no conflict can exist.

Finally, Petitioners offer absolutely no support for their claim that "the Court of Appeals effectively sanctioned a departure from the accepted and usual course of summary judgment proceedings by a lower court as to call for an exercise of this Court's supervisory power," other than their disagreement with the Eleventh Circuit's decision. Petition at p. 8. Petitioners seem to be arguing that because some of the terms of the Ordinance could purportedly be called into question in the hypothetical situations raised by Petitioners' counsel, the Eleventh Circuit's decision finding that the Ordinance was not vague somehow departed from the accepted course of summary judgment proceedings. However, as set forth above, this Court's precedent does not require such a finding and in fact supports the District Court's and Eleventh Circuit's decisions in this matter.

Further, Petitioners cannot demonstrate that a departure from the accepted and usual course of summary judgment proceedings occurred. In this instance, following extensive discovery taken by both parties, competing motions for summary judgment were filed. Petitioners' Appendix at p. 8a. Thus, Petitioners obviously believed that no issue of material fact existed and this case was ripe for entry of summary judgment. However, having disagreed with the District Court's and then Eleventh Circuit's decisions, the Petitioners now contend that the entry of summary judgment *against them* was a departure from the usual course of summary judgment proceedings, requiring an exercise of this Court's supervisory power. However, because the Court properly considered all the

record evidence and memoranda of the parties prior to ruling, no departure can be found.

Thus, Petitioners have failed to demonstrate any basis for the exercise of this Court's jurisdiction. Rather, the case law and facts pointed to by Petitioners demonstrate that the District Court and then Eleventh Circuit properly granted and then affirmed summary judgment in favor of the County.

II. THE ELEVENTH CIRCUIT CORRECTLY FOUND THAT THE ORDINANCE DID NOT VIOLATE PETITIONERS' FREEDOM OF RELIGION RIGHTS IN ACCORDANCE WITH THIS COURT'S PRECEDENT.

The Eleventh Circuit correctly followed this Court's precedent when it found that the Ordinance did not violate Petitioners' freedom of religion rights. The instant ordinance is not directed at religious practices and provides exemptions for otherwise constitutionally protected conduct.

Petitioners first point to *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), in support of their contention that the Court of Appeals erred by failing to extend an exemption to Petitioners' alleged religious conduct. Petition at p. 11. However, the ordinance at issue in *Church of the Lukumi Babalu Aye, Inc.*, is legally and factually distinguishable from the instant Ordinance. Further, a review of this Court's analysis in *Church of the Lukumi Babalu Aye, Inc.*, demonstrates that the Eleventh Circuit reached the proper conclusion in the instant case.

As an initial matter, the ordinance at issue in *Church of the Lukumi Babalu Aye, Inc.* was specifically directed to the religious practices of a particular religion, which required that the law be justified by a compelling governmental interest. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 524, 531-532. However, the Court noted that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has an incidental effect of burdening a particular religious practice." *Id.* at 531. Thus, because the Ordinance in the instance case is neutral and of general applicability, it need not be justified by a compelling governmental interest.[1]

Further, even if it were somehow found that the Ordinance was directed at religious practices, requiring the County to show a compelling reason to refuse to extend the Ordinance's individualized exemptions to Petitioners for their alleged nude religious rituals, the Eleventh Circuit correctly found that the Ordinance did not violate Petitioners' freedom of religion because "the Ordinance itself exempts from its scope constitutionally protected activity." Petitioners' Appendix at p. 6a, n. 4.

In addition to *Church of the Lukumi Babalu Aye, Inc.*, Petitioners point to *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 171 (3d Cir. 2002) and *Levitan v. Ashcroft*, 281 F.3d 1313 (D.C. Cir. 2002), in support of their contention that the Eleventh Circuit erred by stating that

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[1] Similarly, Petitioners' argument that *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), requires that the County provide compelling reasons for refusing to exempt Petitioners' alleged nude religious conduct also fails.

the nudity must be a mandatory part of Petitioners' religion before it could be found to be protected conduct. Petition at p. 12. However, the District Court did *not* hold that the nudity had to be required by Petitioners' religion, as affirmed by the Eleventh Circuit, but noted that "no evidence has been presented that [the Universal Life Church] requires *or even encourages* that a religious ceremony be performed in the nude." Petitioners' Appendix at p. 40a. The District Court further noted that Petitioners' position, that nude religious practices are authorized by the Universal Life Church, may be directly contrary to the Universal Life Church's teachings. *Id.* at p. 42a.

Further, the cases cited to by Petitioners support rather than conflict with the Eleventh Circuit's decision. In *Levitan v. Ashcroft*, 281 F.3d 1313, 1321 (D.C. Cir. 2002), the court noted that "it is sometimes the case that litigants can make no credible showing that the effected practice is either central or important in their religious scheme. In such cases, the *de minimis* burden imposed by the challenged law is not constitutionally cognizable." *Id.*

In this case, the District Court found no credible evidence that nudity was important in Petitioners' religious scheme and concluded that it may in fact be contrary to the tenants of the Universal Life Church. Petitioners' Appendix at p. 40a-41a. Further, as set forth above, the Eleventh Circuit did not even address the issue of whether or not the nudity had to be a mandatory part of Petitioners' religion, finding the fact that the Ordinance provides an exemption for constitutionally protected activity sufficient to reject Petitioners' freedom of religion claims. Petitioners' Appendix at p. 6a, n. 4. Thus, the instant decision is in accordance with the cases

cited to by Petitioners and no basis exists for the exercise of this Court's jurisdiction.

III. IN ACCORDANCE WITH THE OPINIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL, THE ELEVENTH CIRCUIT CORRECTLY FOUND THAT THE SUBJECT ORDINANCE IS CONTENT-NEUTRAL AS IT REGULATES THE CONDUCT OF PUBLIC NUDITY AND IS THUS SUBJECT TO THE INTERMEDIATE SCRUTINY TEST OF *UNITED STATES V. O'BRIEN*, 391 U.S. 367 (1968)

Petitioners have utterly failed to identify any opinion of this Court, or any other court for that matter, which holds that strict scrutiny applies when reviewing a law that regulates conduct. It is undisputed that strict scrutiny applies when a law is a content based law that regulates protected speech. However, as demonstrated by the plain language of the Ordinance, the Ordinance regulates the conduct of public nudity, not speech.

Petitioners point to no case which provides that strict scrutiny would apply in this instance. All of the cases relied on by Petitioners are factually and legally distinguishable and do not support Petitioners' claims. *See, e.g., Hill v. Colorado*, 530 U.S. 703 (2000) (court examined whether a content-neutral statute regulating speech-related conduct within 100 feet of the entrance to any health care facility was a valid time, place and manner restriction); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) (court applied strict scrutiny to Section 505 of the Telecommunications Act of 1996, finding law was content based because it was primarily dedicated to the content of particular, sexually-oriented programming but was unconcerned

with other speech); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1981) (finding ordinance suppressing films containing nudity which were visible from a public place to be content based, but noting that scenes from movies or pictures in books were distinguishable from the kind of nudity traditionally subject to indecent exposure laws and would not suggest that the First Amendment permits nudity in public places); *Cohen v. California*, 403 U.S. 15 (1971) (finding that the conviction of a man based upon his entrance into a courthouse corridor wearing a jacket displaying the phrase "fuck the draft" was based solely on the man's speech and not upon any separately identifiable conduct); *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557 (1995) (finding a parade to be protected speech and finding law requiring private parade sponsor to convey particular message be unconstitutional); *Reeves v. McConn*, 631 F.2d 377 (5th Cir. 1980) (reviewing time, place and manner restrictions with respect to political and educational speeches using sound amplification equipment); *Tunick v. Safir*, 228 F.2d 135 (2d Cir. 2000) (affirming injunction preventing city from interfering with nude photo shoot noting that photographer had clear likelihood of success on the merits of substantive claim because photo shoot likely fell with exemption to anti-nudity ordinance as photo shoot constituted a "play, exhibition, show or entertainment" within the meaning of the exception).

Interestingly, Petitioners also point to *Wyner v. Struhs*, 254 F.Supp.2d 1297 (S.D. Fla. 2003), in support of their proposition that strict scrutiny should apply to the instant Ordinance. Petition at p. 15. However, in that case, which also involved one of the Petitioners in this case, the

court clearly held that the *O'Brien* test applies to determine the validity of a restriction placed on the assembly of a nude peace sign. *Id.* at 1302. Thus, once again, the cases relied on by Petitioners actually support rather than conflict with the District Court's and Eleventh Circuit's application of the *O'Brien* test to the instant Ordinance.

Next, Petitioners erroneously state that the Ordinance's findings and exemptions regulate only speech that has the content of expressive nudity, demonstrating the Ordinance's intent to regulate speech. Petition at pp. 15-16. Petitioners are merely rearguing the merits of their position that was considered and rejected by the District Court and the Eleventh Circuit. However, even considering the merits of Petitioners' claims, it is clear that the Ordinance regulates the conduct of being nude. Petitioners again attempt to equate the simple conduct of being nude with protected speech. Pointing to *City of Ladue v. Gilleon*, 512 U.S. 43 (1994), Petitioners argue that the Ordinance's exemptions are nothing more than a content based regulation of speech. Petitioners' Brief at p. 17. However, in *City of Ladue*, the ordinance at issue regulated the content of signs displayed in yards, providing exemptions to signs that conveyed a particular message. *City of Ladue*, 512 U.S. at 45. In this instance, the subject Ordinance provides exemptions for the *conduct* of being nude in various circumstances such as when a mother is breast-feeding her baby. Appendix at p. 57a. Further, the fact that constitutionally protected nudity is exempted from the enforcement of the Ordinance does not transform the Ordinance into a content-based regulation of speech.

Petitioners have pointed to no decision of this Court or any court which holds that strict scrutiny applies to a law

regulating the conduct of appearing nude in public. Further, under the cases cited to by Petitioners, the District Court and the Eleventh Circuit correctly applied the test set forth by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968), and no conflict exists.

IV. THE ELEVENTH CIRCUIT CORRECTLY FOUND NO INFIRMITY IN THE FINDINGS SUPPORTING THE ADOPTION OF THE ORDINANCE AND NO UNJUST JUDICIAL PROCEDURES CAN BE SHOWN.

Once again Petitioners point to no case in conflict with the Eleventh Circuit's decision and merely reargue the merits of their case in challenging the findings the County relied on in support of the Ordinance. Petition at pp. 18-19. Petitioners ostensibly point to *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), in support of their contention that the Ordinance's findings are without adequate evidentiary basis. *Id.* However, regardless of the underlying facts relied upon in support of the regulations enacted in those cases, in this instance, the County relied on reported instances of public masturbation, sodomy, stalking, distribution of pornographic material, sexual intercourse, lewd and lascivious acts in front of children, oral sex, propositioning sexual acts from females, public urination and defecation, and harassment of others by nude beach goers on Playalinda Beach in enacting the Ordinance. (R.57-Exhibit B).

The County noted in its findings that after various court rulings regarding the non-enforceability of criminal statutes against persons merely appearing nude on Playalinda Beach, there had been an increased number of

complaints regarding people "engaged in open displays of sexual activity as well as lewd and lascivious conduct on all portions of Playalinda Beach." Petitioners' Appendix at p. 50a. The District Court noted that "the minutes of the Board of Commissioner's meetings and other evidence considered by the Board (such as police reports, citizen complaints, and findings of other Florida communities) constitute, as a matter of law, a sufficient factual basis for the Board's findings, including those pertaining to the negative secondary effects. Petitioners' Appendix at p. 27a. The Eleventh Circuit properly affirmed this holding, noting that there was no infirmity in the findings supporting the adoption of the Ordinance. *Id.* at p. 6a. Because the findings made by the County in enacting the instant Ordinance are unique to Brevard County and unrelated to any findings in *Schad* and *Alameda Books, Inc.*, no conflict can exist with these cases.

Finally, the Eleventh Circuit's correct interpretation and application of this Court's precedence does not equate to the sanctioning of "unjust judicial procedures" simply because Petitioners disagree with the ruling. Therefore, Petitioners have failed to demonstrate any basis for this Court to accept jurisdiction or any error in the Eleventh Circuit's decision which would warrant review by this Court.

CONCLUSION

Based on the foregoing, Respondent, Brevard County, Florida respectfully requests that this Court deny certiorari and refuse to accept jurisdiction of this matter.

Respectfully submitted,

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